Supreme Court, U.S.
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No. _____

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

JOHN L. MARSILIO
Petitioner,

v.

CONSOLIDATED RAIL CORPORATION,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

---

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether state railroad safety walkway regulations are preempted by the Federal Railroad Safety Act of 1970, 49 U.S.C. § 20101 *et seq.** or the Federal Employers' Liability Act, 45 U.S.C. § 51 *et seq.*

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* Formerly 45 U.S.C. § 431, *et seq.*, *codified by* Pub.L. 103-272, July 5, 1994, at 49 U.S.C. § 20101 *et seq.*

LIST OF ALL PARTIES

The following parties appeared before the Court of Appeals:

Plaintiff-Appellant: John L. Marsilio

Defendant-Appellee: Consolidated Rail Corporation

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CONSOLIDATED RAIL CORPORATION,

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Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

---

PETITION FOR A WRIT OF CERTIORARI

John L. Marsilio hereby petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

The ruling at issue here, of the United States District Court for the Western District of Pennsylvania, is attached hereto (Addendum, hereinafter "Add.", 1a-3a, *infra*). The orders of the United States Court of Appeals for the Third Circuit affirming the judgment of the district court (Add., 4a-5a, *infra*) and denying the Petition for Rehearing or Suggestion for Rehearing in Banc (Add., 6a, *infra*).

JURISDICTION

The judgment of the United States District Court for the Western District of Pennsylvania was entered June 14, 1993. The decision of the United States Court of Appeals for the Third Circuit affirming the ruling of the lower court was entered on April 15, 1994. The order of the Third Circuit denying Marsilio's petition for rehearing or suggestion of rehearing in banc was denied on May 31, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The Federal Railroad Safety Act of 1970, provides in pertinent part:

> A State may adopt or continue in force any law, rule, regulation, order, or standard relating to railroad safety until such time as the Secretary has adopted a rule, regulation, order, or standard covering the subject matter of such state requirement. A State may adopt or continue in force an additional or more stringent law, rule, regulation, order, or standard relating to railroad safety when necesary to eliminate or reduce an essentially local safety hazard, and when not incompatible with any Federal law, rule, regulation, order, or standard, and when not creating an undue burden on interstate commerce.

49 U.S.C. § 20106.

The Federal Employers' Liability Act provides in pertinent part:

> A regulation, standard, or requirement in force, or prescribed by the Secretary of Transportation under chapter 201 of Title 49, or by a State agency that is participating in investigative and surveillance activities under section 20105 of Title 49, is deemed to be a statute under sections 53 and 54 of this title.

45 U.S.C. § 54a.

The Pennsylvania Public Utilities Commission Code provides as follows:

> The space between the tracks ordinarily used by train and yardmen and other employees as a walkway in the discharge of their duties, in the space beside such tracks within eight feet, six inches of the centerline of such tracks, shall be kept in reasonably suitable condition for such purpose.

53 Pa. Code § 33.125(b).

STATEMENT OF THE CASE

The petitioner, John L. Marsilio, brought this negligence action pursuant the Federal Employers' Liability Act (hereinafter "FELA"), 45 U.S.C. § 51 *et seq.*, for injuries sustained by him in the course of his employment with Consolidated Rail Corporation (hereinafter "Conrail"). At the trial in the district court, the petitioner sought to introduce into evidence section 33.125(b) of the Public Utility Commission Code of Pennsylvania (hereinafter "Pa. Code"), a state safety regulation covering railroad walkways. The district court ruled that the statute was inadmissible based on the Supreme Court case, *C & O Ry. Co. v. Stapleton*, 279 U.S. 587 (1929), and subsequently the jury rendered a verdict in favor of Conrail.

The court of appeals affirmance of the lower court's exclusion of the state walkway statute throws into turmoil the applicability of the existing body of state walkway regulations throughout the country and contravenes established Supreme Court decisions with respect to the applicability of state safety regulations to the railroad industry. Furthermore, it is in direct conflict with the express language of section 54a of FELA, which provides that all orders, rules, regulations, standards, and requirements in force, or prescribed or issued by any state agency, which is participating in investigative and

surveillance activities, shall have the same force and effect as a statute. 45 U.S.C. § 54a.[1]

The record on appeal established that the state regulation in question was enacted for the protection of railroad employees and that, pursuant to 49 U.S.C. § 20105, the State of Pennsylvania was a participant in the Federal Railroad Administration's Safety Program at the time of the incident. The state safety regulation was both relevant and admissible to the appellant's claim pursuant to § 54a of FELA.

The following facts were elicited at the trial:

On March 20, 1990, John L. Marsilio was employed as a car inspector for Conrail at the Conway Yard in Conway, Pennsylvania. Mr. Marsilio was inspecting a train when he stepped out from between two cars and his right leg slipped into a hole in the walkway. Mr. Marsilio lost his balance and fell on the stone ballast twisting his leg and severely injuring his right knee. The visibility was poor as there was no lighting in the area.

During petitioner's case-in-chief, his counsel offered into evidence § 33.125(b) of the Pennsylvania Code on the grounds that the said regulation was "promulgated for the safety of railroad employees," and as such was admissible and relevant. (Add., 2a). Section 33.125(b) of the Pennsylvania Code provides as follows:

> The space between the tracks ordinarily used by train and yardmen and other employees as a walkway in the discharge of their duties, in the space beside such tracks within eight feet, six inches of the

---

[1] 45 U.S.C. § 54a, was formerly part of the Federal Railroad Safety Act of 1970 (hereinafter "FRSA"), at 45 U.S.C. § 437(c). When Title 45 was codified into Title 49, section 437(c) of the FRSA was made a part of FELA, further evidencing Congress' intent that state walkway regulations be admissible in FELA cases.

> centerline of such tracks, shall be kept in reasonably suitable condition for such purpose.

53 Pa. Code § 33.125(b).

Conrail's attorney objected to such admission on the grounds that "The federal government has preempted the field of railroad safety and anything that the Public Utility Commission has promulgated is certainly no guide, has no standing and it has no effect." (Add., 2a, *infra*).

The district court concluded that the state safety regulation was inadmissible based on *Stapleton*. In excluding the state walkway regulation, the court stated as follows:

> THE COURT: I will deny the request. I am basing my decision on an old Supreme Court case, Chesapeake against Ohio Railroad Company—Chesapeake & Ohio Railroad Company against Stapleton, 279 U.S. 587, 1929. Here, there was a child that was a child that was working for somebody—somebody under the age of 16 was working for the railroad and was injured, and they sued under the F.E.L.A., and the plaintiffs sought to bring in the state statute on child labor law.
>
> The Court said this. By the Federal Employers' Liability Act, Congress took possession of the field of employers liability to employees in interstate transportation by rail and all state laws upon that subject were superseded.
>
> * * * *
>
> The employer is liable for injury or death resulting in whole or in part from the negligence specified in the act, and proof of such negligence is essential to recovery. They were trying to say it was negligence per se since he was under the age of 16.
>
> I think this clearly controls this situation, so I will deny the request.

(Add., 2a-3a).

REASONS FOR GRANTING THE PETITION

I. THERE IS A SPLIT IN THE CIRCUITS REGARDING THE APPLICABILITY OF STATE WALKWAY REGULATIONS IN FEDERAL EMPLOYERS' LIABILITY ACT CLAIMS.

The sole issue in this case is whether, in view of *CSX Transp., Inc. v. Easterwood*, —— U.S. ——, 113 S.Ct. 1732, 123 L.Ed.2d 387 (1993), state walkway regulations are preempted by the Federal Railroad Safety Act of 1970, 49 U.S.C. § 20101 *et seq.*, or the Federal Employers' Liability Act, 45 U.S.C. § 51 *et seq.* The decision of the Third Circuit, concluding that the state walkway regulation is preempted by FELA, joins the Fifth Circuit in preempting state walkway regulations, and is in direct conflict with the Ninth Circuit holding that state walkway regulations are not preempted by federal law. Although the Fifth and Ninth Circuit decisions did not involve FELA claims, unless preempted, state safety regulations will apply in FELA cases, as discussed *infra*, at 7-10. Moreover, the opinion of the Third Circuit endorses a method of preemption analysis that is in direct conflict with that used by either the Fifth or Ninth Circuits, and which is contraindicated by the FRSA and the Supreme Court decision of *Easterwood*.

Pursuant to 49 U.S.C. § 20106, states are permitted to regulate rail safety until such time as the Secretary of Transportation ("Secretary") has adopted rules covering a specific subject matter. Congress expressly reserved authority to the states to regulate certain areas of railroad safety. The language of the FRSA and its legislative history, make clear that Congress did not intend to displace state rail safety law absent the enactment of specific federal regulations covering the same subject matter. The preemption clause of the FRSA states:

> The Congress declares that laws, rules, regulations, orders, and standards relating to railroad safety shall

> be nationally uniform to the extent practicable. A *state may adopt or continue in force any law, rule, regulation, order, or standard relating to railroad safety until such time as the Secretary has adopted a rule, regulation, order, or standard covering the subject matter of such state requirement.* A State may adopt or continue in force an additional or more stringent law, rule, regulation, order, or standard relating to railroad safety when necessary to eliminate or reduce an essentially local safety hazard, and when not incompatible with any Federal law, rule, regulation, order, or standard, and when not creating an undue burden on interstate commerce. (emphasis added).

49 U.S.C. § 20106. *See also Hearings Before the Subcomm. on Transp. and Aeronautics of the Comm. on Interstate and Foreign Commerce on H.R. 7068, H.R. 11417, and H.R. 14478, S. 1933*, 91st Cong., 2d Sess., Ser. No. 91-15, p. 29 (1970); S. Rep. No. 91-619, 91st Cong., 1st Sess. 8-9 (1969); H.R. Rep. No. 91-1194, 91st Cong., 1st Sess. p. 19 (1970).

The FRA has not issued regulations covering the subject matter of walkways.

A. The Ninth Circuit Has Concluded That State Walkway Regulations Are Not Preempted By The Federal Railroad Safety Act Of 1970.

The Ninth Circuit, in *Southern Pacific Transp. v. Public Utilities Comm'n*, 647 F. Supp. 1220 (N.D. Cal. 1986), *aff'd.*, 820 F.2d 1111 (9th Cir. 1987) (*per curiam*), addressed whether a state regulation which, *inter alia*, required railroads to provide walkways on each side of their tracks, was preempted by federal regulations relating to track support structure. The Ninth Circuit preemption analysis resolved around the interpretation of

§ 20106, and whether the subject matter of the state regulation was covered by a federal regulation.

The railroad argued in the district court that the state walkway regulations were preempted by federal track safety regulations, which established standards governing the subgrade and ballast on which the tracks were laid. *Id.*, at 1224. The railroad stated that because the state and federal regulations affect the same area of railroad operations, then they cover the same subject matter under § 20106, and thus the state regulations should have been preempted. *Id.*, at 1225.[2]

Judge William Schwarzer pointed out that,

> [T]he legislative history of the FRSA indicates that Congress's primary purpose in enacting that statute was "to promote safety in all areas of railroad operations." H.R. Rep. No. 91-1194, 91st Cong., 2d Sess., *reprinted in* 1970 U.S. Code Cong. & Ad. News 4104 [cited as House Report]; *see also* 45 U.S.C.A. § 421 (West). Congress's concern extended to the safety of employees engaged in railroad operation. House Report at 4106. Read in light of that history, § 434 manifests an intent to avoid gaps in safety regulations by allowing state regulation until federal standards are adopted. State and federal regulations therefore cannot be held to cover the same subject matter unless they address the same safety concerns.

Id. The court concluded that "The ballast regulations relied upon by [Southern Pacific] are designed to insure that tracks have adequate support," *See* 49 C.F.R. § 213.37 (1985), but that "No FRA regulation addresses the concern that employees have a safe working environment near railroad tracks." *Id.*

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[2] The railroad submitted evidence that the state walkway requirement would require an extension of the ballast or subgrade, which were covered by federal regulations. *Id.* at 1224.

The court supported its reading of the § 20106 preemption exception, citing *National Association of Regulatory Utility Commissioners v. Coleman*, 542 F.2d 11 (3rd Cir. 1976). The Third Circuit held in that case that only the precise subject matter of the FRA regulations, monthly accident reporting requirements, was beyond a state's regulatory authority.

B. The Fifth Circuit Has Concluded That State Walkway Regulations Are Preempted By The Federal Railroad Safety Act Of 1970.

The decision of *Missouri Pacific R. Co. v. Railroad Comm'n. of Texas*, 833 F.2d 570 (5th Cir. 1987) (hereinafter "*MOPAC*"), represents the current state of preemption law in the Fifth Circuit. In *MOPAC*, the court addressed precisely the same matter of state walkway requirements at issue in the Ninth Circuit. The Fifth Circuit preemption analysis, like that of the Ninth Circuit, revolved around the interpretation of § 20106, and whether the subject matter of the state regulation was covered by a federal regulation. The Fifth Circuit specifically rejected the approach used by the Ninth Circuit, however, concluding that "The test of whether both federal and state regulations may operate . . . is whether both regulations can be enforced without impairing the superintendence of the field, not whether they are aimed at similar or different objectives." *Id.*, at 573.

The court relied on the introductory language of § 20106, which directs that "laws, rules, regulations, orders, and standards relating to railroad safety shall be nationally uniform to the extent practicable," and concluded that

> It would be impracticable and inconsistent with this intent, if, assuming walkways are integrally related to track structure and composition, 50 states could establish individual walkway regulations in addition to the FRA standards.

Id.[3] Emphasizing federal uniformity of railroad safety laws, the Fifth Circuit reasoned that,

> If the [state] walkway regulation has [the effect of requiring the railroad to strengthen or enlarge the roadbed beyond the FRA requirements], we hold that the federal regulation has 'covered the subject matter' of track composition and design and that the state regulation conflicts with § [20106]'s purpose to foster national rail safety standards 'to the extent practicable.'

Id. The Fifth Circuit distinguished between "a functionally overlapping state regulation and one not 'covered by the subject matter' of an FRA regulation," and suggested that the FRA may be found to have adopted a regulation covering a subject wherever it is found, after investigation, that a state regulation may functionally overlap with some object or aspect of railroad safety which is covered by an FRA regulation. *Id.*

C. The Third Circuit Has Concluded That State Walkway Statutes Are Preempted By The Federal Employers' Liability Act, Without Addressing The Federal Railroad Safety Act Of 1970.

The Third Circuit joined the Fifth Circuit in concluding that state walkway regulations are preempted, but in doing so relied on early Supreme Court law to conclude that state safety regulations are preempted by FELA. The district court held that the state safety regulation was inadmissible, based on *Stapleton*, concluding that "By the Federal Employers' Liability Act, Congress took possession of the field of employers liability to employees in interstate transportation by rail and all state laws upon that subject were superseded." (Add., 3a). The Third Circuit decision to preempt state walkway regulations

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[3] *See also, Donelon v. New Orleans Terminal Co.*, 474 F.2d 1108, 1112 (5th Cir. 1973) ("The ultimate goal of [§ 20106 of] the Act is to establish nationally uniform control of railroad safety," and that the exceptions in § 20106 provided only a "narrow spectrum of deviation from national uniformity. . . .")

throws into turmoil the applicability of the existing body of comparable state walkway regulations throughout the country, and contravenes the express language of both the FELA and the FRSA. More importantly, the analysis endorsed by the Third Circuit is in direct conflict with the preemption analysis outlined by the *Easterwood* decision.

1. *The Federal Employers' Liability Act And The Federal Railroad Safety Act Imbue State Safety Statutes With The Same Force And Effect As Federal Railroad Safety Statutes And Regulations.*

Congress enacted the FRSA subsequent to *Stapleton*, expressly incorporating state safety statutes and regulations as bases for establishing the duties and liabilities of parties in FELA actions. Title 45 U.S.C. § 54a provides:

> A regulation, standard, or requirement in force, or prescribed by the Secretary of Transportation under chapter 201 of Title 49, or by a State agency that is participating in investigative and surveillance activities under section 20105 of Title 49, is deemed to be a statute under sections 53 and 54 of this title.

Title 45 U.S.C. § 53 provides that,

> In all actions . . . brought against any such common carrier by railroad under or by virtue of any of the provisions of this chapter to recover damages for personal injuries to an employee, . . . *no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury of employees.* (emphasis added).

The foregoing statutory language is unambiguous in imparting state safety regulations with the force and effect of federal regulations. The codification of § 54a from the FRSA into FELA further evidences Congress' intent that state safety laws such as § 33.125(b) be admissible in

actions brought under FELA. Barring a finding of preemption pursuant to § 20106 of the FRSA, state walkway regulations such as Pennsylvania Code § 33.125(b) have the same force and effect as federal safety regulations.

To the extent that *Stapleton* is read as prohibiting consideration of any state safety regulations, because they would modify the duties or obligations of employer or employee under the FELA, it is contrary to the express language of the FRSA, which was promulgated subsequent thereto. Furthermore, the interpretation of *Stapleton* endorsed by the Third Circuit is contrary to the recent *Easterwood* decision which established the appropriate standard for determining federal preemption.

2. *The Supreme Court Recently Reaffirmed The Applicability Of State Safety Regulations In* Easterwood.

The Third Circuit's finding of preemption is not in accordance with the Supreme Court decision in *Easterwood*, which established the standard of review in railroad preemption analysis. *Easterwood* was the first case in which the Supreme Court interpreted the preemptive scope of § 20106 of the FRSA, by defining the circumstances under which the Secretary is deemed to have issued regulations "covering the subject matter" of state regulations, and thereby preempting the state regulation of the said subject matter.

The Supreme Court referred to the long held notion that, "[*i*]*n the interest of avoiding unintended encroachment on the authority of the States, . . . a court interpreting a federal statute . . . will be reluctant to find preemption,*" (emphasis added), *Id.*, 113 S.Ct. at 1737, and held that a subject matter is not preempted when the Secretary has issued regulations which merely "touch upon" or "relate to" that subject matter. This Court held that "*preemption will lie only if the federal regulations substantially subsume the subject matter of the relevant state law.*" (emphasis added). *Id.*, at 1738.

While the Third Circuit failed even to consider § 20106 of the FRSA in determining the applicability state walkway regulations, the Fifth and Ninth Circuits analyzed § 20106 of the FRSA but came to opposite conclusions, despite the fact that the state regulations in question were virtually the same.

II. THE DECISION BELOW IS CONTRARY TO PRIOR DECISIONS OF THE SUPREME COURT OF THE UNITED STATES AND THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

The district court misinterpreted *Stapleton*, in light of the *Easterwood* decision, by refusing to admit into evidence the state walkway regulation. The Third Circuit's affirmation of the district court, without opinion, ignores both Third Circuit and Supreme Court case law, as well as § 54a of FELA, all of which support a finding that the state safety regulation was applicable to the defendant, and as such was relevant and admissible.

A. The Third Circuit Erroneously Affirmed The Lower Court's Reliance On *Stapleton*.

The Supreme Court considered in *Stapleton* whether a railroad's violation of a state child labor law could be used to establish negligence *per se* in a claim arising under FELA. The Court noted that "The language of the [FELA] shows unmistakably that the basis of recovery is negligence and that without such negligence no right of action is given under this act." *Id.*, at 589. The Court concluded that the application of a child labor statute to establish negligence *per se* in FELA actions would undermine Congress' intent that recovery under FELA be based on some finding of negligence, and that the state child labor law could not be used in a claim under FELA to impose negligence *per se* on the employer. *Id.*, at 589-590.

The Court in *Stapleton* intended to limit the preemption of state statutes to those which eliminated the requirement

of a finding of negligence. Claims brought under child labor statutes, like the one before the Supreme Court in *Stapleton*, are not grounded in negligence.

The state regulation offered by petitioner's counsel in the present case is distinguishable from the statute in *Stapleton*. Here a railroad safety regulation was promulgated to ensure that the walkway be kept in reasonably safe condition. 53 Pa. Code § 33.125(b). Its violation, if resulting in injury, is necessarily grounded in a finding of evidence.[4]

B. Established Third Circuit Case Law Permits The Admission Into Evidence Of Statutes Enacted For The Safety Of Employees.

Enactment of the FRSA changed the rules regarding the admissibility of state safety laws and regulations for purposes of the FELA. See *supra,* at 7. This change was consistent with the history and purpose of the FELA as a broad remedial statute that would meet the "changing conditions and changing concepts of the industry." The Supreme Court stated in *Kernan v. American Dredging Co.*, 355 U.S. 426, 431 (1958) that,

> [I]nstead of a detailed statute codifying common-law principles, Congress saw fit to enact a statute of the most general terms, thus leaving in large measure to the courts the duty of fashioning remedies for injured employees in a manner analogous to the development of tort remedies at common law. But it was clear that the general congressional intent was to provide liberal recovery for injured workers (citation omitted), and it is also *clear that Congress intended the creation of no static remedy, but one which would be developed and enlarged to meet changing*

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[4] Subsequent Third Circuit case law supports petitioner's interpretation of the *Stapleton* decision. *See Ries v. National Railroad Passenger Corp.*, 960 F.2d 1156, 1164 (3rd Cir. 1992), *infra.*

> *conditions and changing concepts of industry's duty toward its workers.* (emphasis added).

Id. at 432.

The Third Circuit, considering whether the violation of an OSHA regulation requiring safe stairways was negligence *per se* in a FELA claim, held that if a statutory violation "contributes in fact to the death or injury in suit, without regard to whether the injury flowing from the breach was the injury the statute sought to prevent." *Ries v. National Railroad Passenger Corp.*, 960 F.2d 1156, 1159 (3rd Cir. 1992), citing *Kernan v. American Dredging Co.* The *Ries* court said that "It is well settled that the FELA requires a finding of negligence *per se* when there has been a violation of a safety statute specifically aimed at the railroad industry." *Id.* Although the *Ries* court ultimately declined to find that the railroad was negligent *per se* for violating the OSHA regulation, the court concluded that violation of OSHA standards were admissible to show evidence of negligence. *Id.*, at 1164. Notably, the Third Circuit's refusal to find negligence *per se* was based on limiting language within OSHA itself, not a finding of preemption. *Id.*, at 1160-62.[5] Pursuant to the Third Circuit's reasoning in *Ries*, the state safety regulation was admissible as evidence of negligence, and its exclusion constituted reversible error.[6]

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[5] See also, *National Association of Regulatory Utility Commissioners v. Coleman*, 542 F.2d 11 (3d Cir. 1976), *supra*, at 9.

[6] Failure to admit at trial a safety regulation for use as evidence of a standard of care is prejudicial error. *Eckert v. Aliquippa & Southern R. Co.*, 828 F.2d 183 (3rd Cir. 1987); *Rolick v. Collins Pine Co.*, 975 F.2d 1009, 1014 (3rd Cir. 1992) (trial court's failure to admit OSHA regulation as evidence of standard of care in federal diversity negligence action was prejudicial). Proof of violation of a safety statute in a FELA action carries independent significance beyond establishing another basis for recovery against the carrier. Section 53 of the FELA triggers a bar to the defense of contributory negligence where the defendant carrier is liable under a negligence *per se* theory. Foreclosing this opportunity is prejudicial error. *Eckert*, 828 F.2d at 186.

CONCLUSION

For all these reasons, petitioner respectfully requests that the Court accept this petition for certiorari.

Respectfully submitted,

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August 29, 1994

ADDENDUM

IN THE
UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 90-1639

JOHN L. MARSILIO,
Plaintiff,

vs.

CONSOLIDATED RAIL CORPORATION,
Defendant.

Pittsburgh, Pennsylvania
June 9, 1993 9:35 a.m.

TRANSCRIPT OF JURY TRIAL
BEFORE THE HONORABLE MAURICE COHILL
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiff:	Emil R. DiNardo, Esq.
For the Defendant:	Byrd R. Brown, Esq.
Court Reporter:	Jordan Lilienthal 1029 United States Courthouse Pittsburgh, PA 15219 (412) 281-8184

Proceedings recorded by mechanical stenography, transcript produced by notereading,

* * * *

to say. At any rate, the schedule will be, we will finish tomorrow hopefully. It is never chisled in stone. The lawyers think we will be able to finish it tomorrow, and Monday morning you will hear the final arguments of the lawyers and my charge to you on the law.

So about the only real wrinkle is the fact we can't have court on Friday. Have a good lunch. We will see you a quarter of two.

(Court recessed for lunch.)

WEDNESDAY AFTERNOON SESSION

June 9, 1993

(The following proceedings were had out of the presence of the jury:)

THE COURT: Good afternoon. Be seated.

Before the jury comes down, I would like to hear you tell me again why you think this should be admitted, Mr. DiNardo, this Section 30.125 of the Public Utility Commission Code.

MR. DINARDO: I believe that statute is promulgated for the safety of individuals, employees of the railroad, and that under the Eckert case, statutes or regulations that are promulgated for the safety of railroad employees are admissible and relevant.

THE COURT: Mr. Brown.

MR. BROWN: Under the Eckert case that relates to Federal statutes and federal regulations. The federal government has preempted the field of railroad safety and anything that the Public Utility Commission has promulgated is certainly no guide, has no standing and it has no effect.

THE COURT: I will deny the request. I am basing my decision on an old Supreme Court case, Chesapeake against Ohio Railroad Company—Chesapeake & Ohio Railroad Company against Stapelton, 279 U. S. 587, 1929. Here there was a child that was working for somebody—somebody under the age of 16 was working for

the railroad and was injured, and they sued under the FELA, and the plaintiffs sought to bring in the state statute on child labor law.

The court said this. By the Federal Employers Liability Act, Congress took possession of the field of employers liability to employees and in interstate transportation by rail and all state laws upon that subject were superseded.

The rights and obligations of the petitioner—that would be the child—depend upon that act and applicable principles of common law as determined by the federal courts.

The employer is liable for injury or death resulting in whole or in part from the negligence specified in the act, and proof of such negligence is essential to recovery. They were trying to say it was negligence per se since he was under the age of 16.

I think that clearly controls this situation, so we will deny the request.

(Whereupon, the jury entered and was duly seated.)

THE COURT: Good afternoon. Okay, Mr. DiNardo.

MR. DINARDO: The plaintiff will call Mr. Ron Kopriva.

RONALD KOPRIVA, called as a witness on behalf of the Plaintiff, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. DINARDO:

Q. Mr. Kopriva, would you please tell the jury where you are employed?

A. Conrail.

Q. How long have you been employed by the railroad?

A. 28 years.

Q. What is your date of hire?

A. 2-11-65.

Q. And your position in the railroad?

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 93-3316

JOHN L. MARSILIO,
Appellant

v.

CONSOLIDATED RAIL CORPORATION

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA
(D.C. Civil No. 90-01639)
District Judge: Maurice B. Cohill, Jr.

Argued on March 28, 1994

Before: GREENBERG, COWEN and NYGAARD, *Circuit Judges*

JUDGMENT ORDER

After consideration of all contentions raised by appellant, it is

ADJUDGED and ORDERED that the judgment of the district court entered June 14, 1993 be and is hereby AFFIRMED.

Costs taxed against appellant.

BY THE COURT

Circuit Judge
[Illegible]

Certified as a true copy and issued in lieu of a formal mandate on June 15, 1994.

Teste: P. Douglas Sisk
Clerk, U.S. Court of Appeals for the Third Circuit

Attest:

[Illegible]
Chief Deputy Clerk

Dated: Apr. 15, 1994

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 93-3316

JOHN L. MARSILIO,
Appellant
v.
CONSOLIDATED RAIL CORPORATION

SUR PETITION FOR REHEARING

Present: SLOVITER, *Chief Judge*, BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN, NYGAARD, ALITO, ROTH and LEWIS, *Circuit Judges*

The petition for rehearing filed by appellant in the above-entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

BY THE COURT,

[Illigible]
Circuit Judge

Dated: May 31, 1994

Supreme Court, U.S.
FILED
SEP 28 1994
OFFICE OF THE CLERK

(2)

No. 94-0378

In The

Supreme Court of the United States

October Term, 1994

JOHN L. MARSILIO,

Petitioner,

vs.

CONSOLIDATED RAIL CORPORATION,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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IV. There is no current conflict between the Circuits. 9

V. The Supreme Court in *CSX Transportation, Inc. v. Easterwood*, __ U.S. __, 113 S. Ct. 1732, 123 L. Ed. 2d 387 (1993) resolved existing conflicts between the Circuits relating to FRA preemption and no further Conflicts have been noted. 11

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SUMMARY OF ARGUMENT

Petitioner seeks a determination that the regulation designated as § 33.125(b) of the Public Utility Commission Code of Pennsylvania (hereinafter "Pa. Code") was not preempted by the Federal Railroad Safety Act of 1970, 45 U.S.C. § 434 (hereinafter, FRSA) or the Federal Employers' Liability Act, 45 U.S.C. § 51, *et seq.* (hereinafter, "FELA"). Petitioner's contention in this respect is predicated upon proof that the Pennsylvania Public Utility Commission was, at the time of the accident in suit, a state agency which, pursuant to 45 U.S.C. § 435, was designated by the Secretary of Transportation as participating in surveillance and investigative activities. *See* 45 U.S.C. § 437. Proof of this relationship was never offered in the District Court. Further, evidence tending to establish this claim was not included in Petitioner's Appendix before the Court of Appeals nor did Petitioner file a motion before the Court of Appeals requesting leave to supplement the record. On the contrary, Petitioner sought to prove his contention by simply appending unauthenticated documents to his Brief before the Court of Appeals and designating same as a Supplemental Appendix. Respondent, in its Reply Brief, objected to Petitioner's attempt to supplement the record in this respect as constituting a flagrant violation of the Rule 10(e) of the Federal Rules of Appellate Procedure. The Court of Appeals apparently declined to consider the subject material and the related issue of preemption, and affirmed the verdict of the court below without opinion.

Petitioner's claim of trial error merely involves *de minimis* semantic distinctions gleaned from the court's charge. Petitioner complains that the court failed to charge in accordance with the PUC regulation that the railroad must maintain walkways between tracks "in a reasonably suitable condition" rather than "in a reasonably safe condition" in accordance with the duty imposed by the FELA. Any error in this respect was harmless.

There is no conflict between the Circuits as alleged. Decisional variations between the Circuits are attributable to variations in proofs presented in the District Courts.

Additionally, this Court's decision in *CSX Transp. Inc. v. Easterwood*, __ U.S. __, 113 S. Ct. 1732, 123 L. Ed. 2d 387 (1993) resolved conflicts related to the issue Petitioner seeks to raise.

COUNTERSTATEMENT OF THE CASE

Petitioner, John L. Marsilio, brought this action pursuant to the Federal Employers' Liability Act (hereinafter, "FELA"), 45 U.S.C. § 51, *et seq.*, for injuries sustained by him in a fall in the course of his employment by Consolidated Rail Corporation (hereinafter, "Conrail"). At the trial in the District Court Petitioner sought to introduce into evidence a regulation designated as § 33.125(b) of the Public Utility Commission Code of Pennsylvania (hereinafter, "Pa. Code"). Petitioner further claimed that a violation of same constituted negligence *per se* which would preclude Respondent from asserting the defense of contributory negligence pursuant to the provisions of the FELA. The regulation itself provides that the space between railroad tracks which railroad employees use as walkways "shall be kept in a reasonably suitable condition for such purpose". The District Court declined to charge pursuant to the precise language of the Pa. Code and opted to charge in accordance with the standard imposed by the FELA that the Respondent's duty with respect to areas between its tracks was to "maintain and keep such place of work in a reasonably safe condition". The jury empaneled to try the matter rendered a verdict in favor of Conrail. Petitioner appealed to the United States Court of Appeals for the Third Circuit which affirmed the judgment of the District Court without opinion.

In order to assert the claim that the subject Pa. Code Regulation had the force and effect of a statute, it was necessary

that Petitioner prove that the Pennsylvania Public Utility Commission was, pursuant to 45 U.S.C. §§ 435 and 437, a state agency approved to participate in the "investigative and surveillance" activities articulated by the FRSA. However, no evidence was presented on this issue in the District Court. Petitioner also failed to make note of any material related to this matter in the Appendix filed in the Court of Appeals. Nevertheless, without leave of court or notice to Respondent, Petitioner attached to his Brief before the Court of Appeals a Supplemental Appendix which contained copies of unauthenticated documents which Petitioner asserts prove his contention. Respondent, in its Brief before the Court of Appeals, objected to the consideration of this material as same was not only not presented to the District Court nor included in Petitioner's Designation of Appendix in the Court of Appeals, but consisted of copies of unauthenticated, unexplained documents which Petitioner contends establish a significant relationship between the Commonwealth of Pennsylvania and the United States Department of Transportation. The Court of Appeals affirmed the judgment of the District Court without opinion.

REASONS FOR DENYING THE WRIT

I.

THE RECORD FAILS TO ESTABLISH THAT EVIDENTIARY MATERIAL ESSENTIAL TO PETITIONER'S CONTENTION RELATING TO PREEMPTION WAS PROPERLY PRESENTED TO OR CONSIDERED BY THE COURTS BELOW OR THAT THE ISSUE OF PREEMPTION WAS DECIDED BY THE COURT OF APPEALS.

Petitioner notes that the express language of the Federal Employers' Liability Act provides in pertinent part:

> All orders, rules, regulations, standards, and requirements in force, or prescribed or issued by the Secretary under this subchapter, or by any State agency which is participating in investigative and surveillance activities pursuant to section 435 of this title, shall have the same force and effect as a statute for the purposes of the application of sections 53 and 54 of this title, relating to the liability of common carriers by railroad for injuries to their employees.

45 U.S.C. § 437(c).

Thus, a threshold requirement for Petitioner's maintenance of his current position is proof that, on the date of the accident in suit, to-wit; March 20, 1990, the Pennsylvania Public Utility Commission was, in fact, an approved participant in investigative and surveillance activities. This matter was never mentioned in the District Court. Petitioner, in designating his Appendix before the Court of Appeals, never referenced this matter. The initial evidentiary reference to this condition precedent appears in a Supplemental Appendix attached to Petitioner's Brief. Said Supplemental Appendix contains a photocopy of an unsigned letter with a date stamp of March 5, 1990 from J.W. Walsh, Associate Administrator for Safety to Kenneth E. Nicely, Director of Bureau of Safety and Compliance, indicating *inter alia,* that Mr. Walsh had approved the PUC "FY 1990 Application for participation in the Federal Railroad Administration's (FRA) State Participation Railroad Track, Motive Power and Equipment, and Operating Practices Safety Inspection Programs," and indicated that "no federal grant funds were appropriated by Congress for this program in FY 1989 and FY 1990". One of the documents contained a date which is crossed out and replaced by the handwritten notation of March 5, 1990. The document which

purports to be a copy of the Commonwealth's application indicates on its face that the Commonwealth did not seek participation in the "signal and control" categories of the Federal Railroad Safety Program. Additional unauthenticated and equally unexplained documents are attached to the Petitioner's purported "Supplemental Appendix."

There is no indication whatsoever that the Court of Appeals considered the complained of evidentiary matter or reached the issue of preemption. The inclusion of this evidentiary material in a Supplemental Appendix attached to Petitioner's Brief clearly and flagrantly violated Rule 10(e) of the Federal Rules of Appellate Procedure relating to correcting or modifying the record before the Court of Appeals. Respondent strenuously objected to Petitioner's improper attempt to modify the record and in its Reply Brief stated:

> No argument or evidence was presented to the trial court in this matter. It was not until the filing of Appellant's Brief in this appeal that any argument or substantive material in the form of the unauthenticated documents attached to Appellant's Supplemental Appendix made reference to this contention. Hence, this issue can not be raised on appeal. In this respect, we also note that the documents attached to Appellant's Brief as a Supplemental Appendix are not authenticated; dates have been changed on the face of one document; and the custodians and/or signatories have not had the opportunity to be subject to cross-examination.
>
> Appellee requests that this court decline to consider this improperly filed "Supplemental Appendix". New evidence cannot be presented

> in this manner at this time in the litigation. As a result of the highly unusual and inappropriate attempt to submit this evidence, appellee contends that the "Supplemental Appendix" must be stricken from the record. See, *Gravenmier v. U.S.*, 399 F.2d 677, 678 n. 1 (9th Cir. 1968); *U.S. v. Nash*, 342 F.2d 326 (6th Cir. 1965). Consequently, appellee requests that Point I C of Appellant's Brief be stricken, as it totaly relies upon the improper and unauthorized Supplemental Appendix.

Appellee's Reply Brief in Court of Appeals pages 13-14.

Inasmuch as the Decision in the Court of Appeals was not clarified by an opinion, it appears that the court declined to consider the issue which Petitioner now seeks to raise by Writ of Certiorari and followed the practice it articulated in *In re Capital Cities/ABC, Inc.'s Application for Access to Sealed Transcripts*, 913 F.2d 89 (3rd Cir. 1990), citing and quoting *Ross v. Kemp*, 785 F.2d 1471, at 1475 (11th Cir. 1986) that supplemental material will not be considered when "a party has filed supplemental material without requesting leave of th(e) court or has appended material to an appellate brief without filing a motion to supplement." Respondent, therefore, suggests that the Court of Appeals did not consider Petitioner's contention in this respect and followed the time-honored principle that courts should not reach out to decide constitutional issues which are not properly before it or necessary for the resolution of the controversy. Certainly it cannot be assumed, as Petitioner contends, that the Court of Appeals ruled on this issue. Inasmuch as the record does not clearly establish that the issue of preemption was properly raised in or considered by the Court of Appeals, this Court should not grant the Writ, as the record does not and can not establish that matters fundamental to the court's adjudication were raised in or considered by the courts

below. *Hines Yellow Pine Trustees v. Martin, et al.*, 268 U.S. 458, 45 S. Ct. 543, 69 L.E. 1050 (1925); *Freeman v. Bee Machine Co., Inc.*, 319 U.S. 448, 63 S. Ct. 1146, 87 L.E. 1509 (1943); *Brooks v. United States*, 337 U.S. 49, 69 S. Ct. 918, 93 L.E. 1200 (1949); *McMahon v. United States*, 342 U.S. 25, 72 S. Ct. 17, 93 L.E. 26 (1951); *Adickes v. S.H. Kress Company*, 398 U.S. 144, 90 S. Ct. 1598, 26 L. Ed. 2d 142 (1970).

II.

ANY ERROR WAS, IN FACT, HARMLESS.

Regardless of the relevance of the PUC regulation, the court's election to charge pursuant to the comparable and similar standards of the FELA renders Petitioner's claim harmless error at best.

The court's charge to the jury on the issue of negligence and the standard of care was as follows:

> Every common carrier by railroad, or in this case, every railroad, while engaging in commerce between any of the several states shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce for such injury resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier. . . .
>
> It was the continuing duty of the defendant, as an employer, at the time and place in question, to use ordinary care under the circumstances, in furnishing the plaintiff with a *reasonably safe place* in which to work, and to

> use ordinary care under the circumstances to *maintain and keep such place of work in a reasonably safe condition.*
>
> An employer must make proper inspections to discover dangers in places where employees must work. And after ascertaining there [sic] existence, must take reasonable precautions for the safety of the employees and the employees have the right to rely on the performance of the duty by the employer and have a right to govern their actions accordingly.

(Emphasis added) (A. 321-322).

The standard articulated in Pa. Code § 33.125(b) imposes a duty on railroads to maintain the areas between tracks where its trackmen work "in a reasonably suitable condition for such purpose." This standard is mirrored and subsumed in the court's charge imposing a duty requiring Respondent to "*maintain and keep such place of work in a reasonably safe condition.*" (A. 322). The difference between the PVC regulation and the stringent duty requirements of the FELA is *de minimis,* at most. In fact, the duty imposed by the FELA upon the railroad appears to be greater. Clearly, no constitutional issue or issue of public significance is raised by the court electing to charge in accordance with the approved time-honored mandates of the FELA. As a result of the congruence of the court's charge and the regulation in question, even if the District Court improperly excluded the PUC regulation, the error would not have effected the judgment and, is, therefore, harmless. *McQueeney v. Wilmington Trust Co.,* 779 F.2d 916 (3d Cir. 1985).

III.

THE CASE AT BAR IS NOT IMPLICATED IN A CONFLICT BETWEEN THE CIRCUITS.

This case is not implicated in any alleged conflict between the Circuits on the constitutional issue of preemption as the record does not reveal that the court below reached the issue of preemption. The conlcusion that the Court of Appeals adjudicated a significant constitutional issue without opinion is also defeated by the fact that the matter before the Court involves the resolution of whether or not a jury instruction properly defined the respective duties of the parties. Unlike the cases relied upon by Petitioner to generate a false conflict between the Circuits, this case does not involve comprehensive state regulations concerning construction, elevation or surface requirements of walkways between tracks. *See and compare, Missouri Pacific Railroad Company v. Railroad Commission of Texas,* 833 F.2d 570 (5th Cir. 1987), *remanded,* 823 F. Supp. 1360, *affirmed,* 948 F.2d 179 (5th Cir. 1991) and *Southern Pacific Transportation v. Public Utilities Commission,* 647 F. Supp. 1220 (N.D. Cal. 1986), *aff'd,* 820 F.2d 1111 (9th Cir. 1987) (per curiam).

IV.

THERE IS NO CURRENT CONFLICT BETWEEN THE CIRCUITS.

Petitioner relies upon the case of *Missouri Pacific Railroad Company v. Railroad Commission of Texas,* 833 F.2d 570 (5th Cir. 1987) and claims that it is in conflict with the Ninth Circuit's decision in *Southern Pacific Transportation v. Public Utilities Commission,* 647 F. Supp. 1220 (N.D. Cal. 1986), *aff'd,* 820 F.2d 1111 (9th Cir. 1987) (per curiam). The regulations in question in each of these cases and the case at bar have been characterized as

walkway regulations. However, the regulation in the case at bar simply attempts to articulate a general standard of care and differs fundamentally from those construed in *Southern Pacific* and *Missouri Pacific, supra.*

The regulations construed in *Southern Pacific, supra,* were summarized by the District Court as follows:

> In 1948, CPUC adopted General Order No. 26-D. This order prescribes the minimum distances (clearances) railroads must maintain between freight cars and structures located above and beside railroad tracks and between parallel tracks. The part of the order challenged here provides that, with certain exceptions, "[t]he minimum distance between center lines of parallel standard gauge tracks shall be fourteen (14) feet." The order applies to tracks constructed or reconstructed after its effective date.
>
> General Order No. 118 was adopted in 1963. That order requires railroads to maintain a two-foot wide continuous walkway on each side of their tracks. The order provides that "walkways shall provide a reasonable, regular surface with gradual slope not to exceed one inch to eight inches."

647 F. Supp. 1220 at p. 1222 (1986).

The regulations construed by the Fifth Circuit in *Missouri Pacific Railroad v. Railroad Commission of Texas, supra,* required that walkways between tracks must be "smooth, maintained, properly sloped walkways which are level with the tops of the ties

along both sides of all tracks within railyards and the tracks adjacent thereto, in an effort to provide safer working conditions for employees working on or about the tracks". *Missouri Pacific,* 833 F.2d at 574. However, the precise holding in *Missouri Pacific* cited by Petitioner is articulated in the court's statement that "we believe there is a material fact issue concerning the interrelationship between the state walkway requirements and federal track regulations. *Id.* at 575. Consequently, the matter was remanded for further proceedings. Upon remand, the District Court, after hearing, made detailed findings of fact and concluded that preemption had, in fact, occurred. *See Missouri Pacific R.R. Co. v. Railroad Commission of Texas,* 833 F. Supp. 1360, *aff'd,* 948 F.2d 179 (5th Cir. 1991).

A review of the cases cited by Petitioner and those referenced in the Briefs before the Court of Appeals does not reflect a fundamental conflict between the Circuits as to the applicable law. The variations in result are attributable primarily to variations in proofs before the District Courts. This is clearly not a matter for review by a Writ of Certiorari.

V.

THE SUPREME COURT IN *CSX TRANSPORTATION, INC. V. EASTERWOOD*, __ U.S. __, 113 S. CT. 1732, 123 L. ED. 2D 387 (1993) RESOLVED EXISTING CONFLICTS BETWEEN THE CIRCUITS RELATING TO FRA PREEMPTION AND NO FURTHER CONFLICTS HAVE BEEN NOTED.

This Court decided the case of *CSX Transportation, Inc. v. Easterwood,* __U.S. __, 113 S. Ct. 1732, 123 L. Ed. 2d 387 (1933) on *April 21, 1993. CSX Transportation v. Easterwood, supra* represented a comprehensive statement of the principles involved in considering the matter of FRA preemption. Cases cited and

relied upon by Petitioner predate *Easterwood*. There appears to be no conflict or confusion in the federal Circuits concerning the appropriate standards to apply with respect to matters involving properly raised FRA preemption issues subsequent to *Easterwood*. Therefore, issuance of the Writ of Certiorari is not warranted.

CONCLUSION

For the reasons stated above, Respondent prays that your Honorable Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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